

Judging Public Procurement Disputes: The Necessity of Commercial Judicial Review?

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Judging Public Procurement Disputes: The Necessity Of Commercial Judicial Review?

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Why ask this question?

- Both public procurement law and judicial review has been subject to several reforms and Regulation amendments in recent years.
- The Ministry of Justice identifies 'the judicial review of public procurement disputes' as one of the reasons for the overall growth in the number of JR applications.
- Looking at public procurement disputes, brought by means of JR, facilitates an opportunity to investigate all other areas of commercial JR concern.
- The Government has recently (5/09/2014) defended its judicial review reforms, saying it is "particularly keen to reduce the extent to which legal challenge unduly hinders economic development and regeneration...there have been a number of judicial reviews which have resulted in considerable delays to development projects, including infrastructure, housing, retail and residential developments." This undermines the important role of judicial review in ensuring good governance and procurement practices.

What are the different possibilities for resolving a public procurement dispute?

Public Contract Regulations

- By bringing a claim, via the High Court, under the Public Contract Regulations 2006 (as amended by revisions in 2009 and 2011).

Implied Contract

- By finding an implied contract between the contracting authority and 'would be' economic operators, as per *Blackpool & Fylde Aero Club v Blackpool Borough Council* [1990] EWCA Civ 13

European Commission

- An investigation by the European Commission, and (if not satisfied with the response) infraction proceedings may be brought against the Member State. TFEU Article 258.

Judicial Review

- Most commonly used in situations where 1) the Regulations do not apply; 2) the economic operator seeks a resolution not available under the Regulations 3) the claimant is not the economic operator e.g. 'third parties'.

Methodology and Background

In order to address the question of the necessity of commercial JR, desk based investigations were carried out. There are contrasting views within the existing literature as to how many JR applications are made each year. For example, The Ministry of Justice's figures document that public procurement accounted for 1.82% of the total number of JR claims in 2011 (approx. 200 public procurement claims of a total of over 11,000 cases). By contrast, public procurement practitioners have suggested the figure is below ten (Bowsher, 2013). This investigation advances existing knowledge as to the current use of JR by 1) studying the primary grounds for the challenges being brought, and 2) the judges' treatment of such cases. Existing literature also cites regional differences in the use of JR; for example more frequent use in NI (Giffin 2012). So as to investigate these regional differences, this investigation also identified the country where the challenge was brought. These regions were defined by looking at the location of the contracting authority within each dispute. This investigation identified a total of 36 reported cases between 2006 and present day.

Northern Ireland: (4 cases)

- Highest number of judicial review challenges outside England/London.
- Highest number of internal disputes i.e. Northern Irish claimants disputing NI contracts.
- Highest levels of positive treatment by the judiciary (although signs this is changing in 2014).
- The only region to have reported cases in 2014. Examples [2014] NIQB 16 & [2014] NIQB 9.

Wales: (2 cases)

- Fewest number of judicial review challenges of any region.
- No reported JR cases since 2006. Examples [2006] EWHC 727 (Admin) & [2006] EWHC 2167 (Admin)

FINDINGS

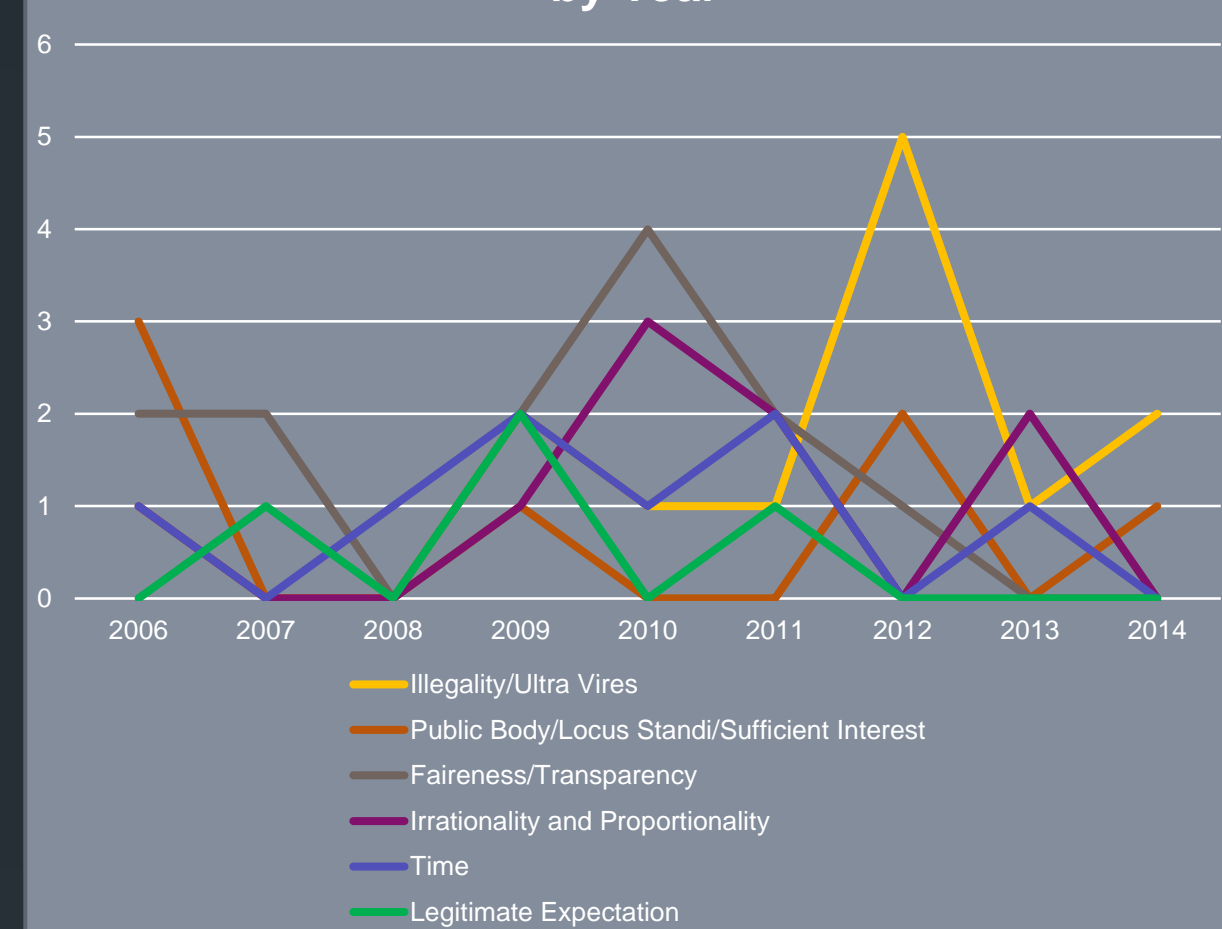
Scotland (3 cases)

- All three judicial review cases were pursuing enforcement of a Regulation right.
- All three cases pertained to technicalities associated with the procurement process e.g. award criteria, award notices etc.
- Less concerned with the divide between traditional public JR and commercial JR. Examples [2010] SLT 481 & [2010] S.L.T. 513

England (27 cases)

- Highest number of judicial review challenges (overall) owing to the number of claims against Central Government.
- Highest number of 'irrationality in the procurement process' claims, despite [2005] EWCA Civ 811, Buxton LJ stating "It is difficult to fit allegations of irrationality into the framework of a separate application different from complaints under the Regulations." para 18

Primary Ground/s for Judicial Review Challenge of Public Procurement Dispute by Year



Positive and Negative Treatment of Public Procurement Disputes Brought by Judicial Review



Challenges for Now and the Future?

- MoJ identified judicial review of public procurement disputes as one of the areas where further reform was needed.
- In Feb 2014 the Govt reduced the time limit for bringing a JR claim, concerning a Regulation right from 3 months to 30 days.
- The aim was to align the time limit for instigating a JR claim with the other remedial possibilities; promote certainty; and limit the scope for unmeritorious claims.

Judicial Review Reform



- The current system dis-incentivises challenging procurement practices.
- Today the aggrieved party has to invest significant amounts of money in a highly speculative outcome.
- For the average lay person, to decide upon the appropriate remedial route, gather the required documentation/evidence, and finance their claim, within 30 days, is a significant burden.
- 'Biting the hand that feeds you' argument is still prevalent in Britain.

Non-Challenge Culture



- Within the wider context of the future of public procurement law, a new EU Directive (2014/24/EU) has recently been implemented. EU Member States have 2 years to transpose the changes.
- "The government is aiming to implement these Directives quickly, so that the UK can benefit as soon as possible from the improved flexibilities they offer." (Cabinet Office, July 2014)
- Future consequences for public procurement remedies currently unknown (still being considered).

The Future: New EU Directives



Conclusions:

The Role and Necessity of Commercial Judicial Review in Resolving Public Procurement Disputes:

- Public law has an important role to play in the resolution of public procurement disputes- judicial review offers a remedial route that ensures the principles of good public office are enforced when needed.
- Yet there are significant disincentives and barriers for aggrieved parties to challenge malpractice by judicial review.
- Prior to consultation CP 25122012, there was **no great public procurement dispute burden upon the Administrative Court** on the scale suggested by the MoJ in 2013.
- There are now on average approx. **4 JR cases per year** pertaining to public procurement (recent trends suggest this is declining).
- The judiciary already effectively filter out unmeritorious claims (approx. 76% of the above negative treatment pertains to applications for JR, rather than full hearings.)
- The judiciary are already sensitive to the need to resolve commercial disputes promptly, for both financial reasons and so as to reduce delays in the delivery of a public service. Example: [2010] EWHC 2550

Reality:

The 'Reforms', coupled with other recent changes to JR (such as cuts to legal aid), have removed the 'JR safety net' for aggrieved economic operators. Potential for rise in LiPs. It is likely that cases concerning 'time' will continue to rise. Possibly as a result of a rush to litigation, or so as to see how the *Uniplex* [2010] EUECJ C-406/08 ruling should now be read.